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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHN EARL CAMPBELL,	)	NO. C05-5434 MJJ (EDL)
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
NATIONAL PASSENGER RAILROAD	)	
CORPORATION dba AMTRAK, JOE	)	
DEELY, and DOES 1-15, inclusive,	)	
	)	
Defendants.	)	

**PLAINTIFF JOHN EARL CAMPBELL'S  
MEMORANDUM OF POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT JOE DEELY'S  
MOTION FOR SUMMARY JUDGMENT, OR IN THE  
ALTERNATIVE, PARTIAL SUMMARY JUDGMENT**

**DATE: May 22, 2007**  
**TIME: 9:00 A.M.**  
**CTRM.: 11, 19<sup>TH</sup> FLOOR**  
**TRIAL DATE: JULY 23, 2007**

HON. MARTIN J. JENKINS

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**SUMMARY OF ARGUMENT**

Mr. Campbell opposes Defendant Deely's Motion for Summary Judgment on five (5) principal grounds.<sup>1</sup> First, Mr. Campbell has shocking and disturbing direct evidence of racial bias toward African-Americans by Defendant Deely which precludes summary judgment as a matter of law. Second, the evidence clearly reflects that Mr. Campbell's termination was foretold after he complained to the DFEH about the racial discrimination to which AMTRAK subjected him and others. Third, Mr. Campbell has more than sufficient evidence to establish a causal link between his protected activity in April 2004 and the retaliatory acts which followed in August 2004, in violation of FEHA and 42 U.S.C. Section 1981. Fourth, Mr. Campbell's complaints for retaliation are timely under Section 1981 and his DFEH Charge filed on August 17, 2005. Fifth, Section 1981 does provide for a retaliation claim against Defendant Deely.

The evidence in the case clearly demonstrates that Mr. Campbell was treated differently from other similarly Caucasian employees in terms of promotional opportunities, disciplinary actions and his eventual termination. AMTRAK's management under Defendant Deely's leadership has a history, pattern and practice of discrimination against African-Americans on the basis of race. This is a case that cries out for punitive damages against the Defendants for their ill-fated efforts to cover up their misconduct and sanctions against counsel for participating in the cover-up.

**STATEMENT OF FACTS**

Mr. Campbell graduated from Oakland High School in 1980. (See Declaration of John Earl Campbell in Opposition to Defendants Joe Deely and National Passenger Railroad

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<sup>1</sup> Mr. Campbell does not oppose Defendant Deely's Motion for Summary Adjudication of his common law claims for intentional and/or negligent infliction of emotional distress on the grounds that such claims arguably are pre-empted by FELA or as to any claims for retaliation which might have been brought under FEHA based upon the failure to promote him. Mr. Campbell opposes the Motion to the extent it seeks to adjudicate any of his claims under 42 U.S.C. Section 1981 based upon the failure to promote him or based upon the last-filed DFEH Charge.

1 Corporation's Motions for Summary Judgment Or In the Alternative, Partial Summary Judgment  
2 (hereinafter "JEC DEN @") at pp. 1:26.) He attended Merritt College from September 1980 to  
3 June 1981. (JEC DEN @ 1:26-27.) On May 10, 1984, Mr. Campbell was hired as a Track  
4 Laborer by Southern Pacific Railroad. (JEC DEN @ 2:1.) In late 1985, Mr. Campbell became a  
5 Machine Operator. (JEC DEN @ 2:2.) Prior to His promotion to Machine Operator, Mr.  
6 Campbell passed the necessary qualification tests and received the appropriate certifications to  
7 operate Back hoes, loaders and tampers. (JEC DEN @ 2:2-4.) Mr. Campbell held that  
8 position until February 1992 when Mr. Campbell left Southern Pacific. (JEC DEN @ 2:4.)

9 Mr. Campbell began his career with AMTRAK on September 29, 1998. (JEC DEN  
10 @ 2:5.) From his date of hire to September 1999, Mr. Campbell worked as an Assistant  
11 Conductor at the Oakland Crew Base. (JEC DEN @ 2:5-6.) As Assistant Conductor, Mr.  
12 Campbell was responsible for the safe operations of his assigned train, helping passengers on and  
13 off the train, and taking tickets. (JEC DEN @ 2:6-8.)

14 For approximately a year, Mr. Campbell worked as an Assistant Yard Conductor at  
15 the Oakland Crew Base. (JEC DEN @ 2:9-10.) Mr. Campbell bid into that position based on his  
16 seniority in the union - this was not a promotion. (JEC DEN @ 2:10-11.) Mr. Campbell did not  
17 submit any type of application and he was not interviewed for this position. (JEC DEN @ 2:11.)  
18 He did not receive a pay raise and in fact, took a pay cut to work in the Oakland Yard as an  
19 Assistant Conductor. (JEC DEN @ 2:12-13.) He loved his job and during a period of time when  
20 Amtrak was extremely short-staffed, he worked twenty-eight (28) days straight. (JEC DEN @  
21 2:13-14.)

22 From 2000 up until his termination in August 2004, except for a one year stint in San  
23 Francisco, Mr. Campbell worked as the Yard Conductor for the Oakland Yard. (JEC DEN @  
24 2:15-16.) Again, Mr. Campbell bid into that position based on his seniority in the union - this  
25 was not a promotion. (JEC DEN @ 2:16-17.) Mr. Campbell did not submit any type of  
26 application and he was not interviewed for this position. (JEC DEN @ 2:17-18.)

27 In late 2002, Mr. Campbell bid on and received the position of Work Train Conductor  
28

1 to work on a nine-month project called the Baby Bullet Project at the San Francisco Crew Base.  
2 (JEC DEN @ 2:20-21.) It was a \$200,000,000 project which involved upgrading the tracks with  
3 new ties and new rails in order to bring high speed passenger train service to the Bay Area. (JEC  
4 DEN @ 2:21-23.) Mr. Campbell was in charge of delivering equipment to the various locations  
5 in the Yard. (JEC DEN @ 2:23-24.) The project was successfully completed in early 2004.  
6 (JEC DEN @ 2:24-25.) At that time, he returned to the Oakland Crew Base as a Yard  
7 Conductor. (JEC DEN @ 2:25-26.)

8 During his tenure in San Francisco working on the Baby Bullet Project, Mr. Campbell  
9 received numerous accolades, encouragement and appreciation from the front line supervisors.  
10 (JEC DEN @ 2:27-28.) In late 2003, sometime between October and December, Mr. Campbell  
11 was “bumped” by another conductor with more seniority. (JEC DEN @ 2:28-3:2.) His  
12 supervisors placed him in a “quasi-official” or unofficial supervisor’s position in order to keep  
13 him working on the project until it was completed. (JEC DEN @ 3:2-3:3.)

14 As the Yard Conductor, Mr. Campbell acted as the foreman for the crew on duty  
15 during his shift. (JEC DEN @ 3:4-5.) During any given shift, he supervised a crew of two,  
16 including an Assistant Conductor and an Engineer. (JEC DEN @ 3:5-6.) The physical area that  
17 was subject to his authority included all of the tracks in the Oakland Crew Base, which was made  
18 up of nine (9) tracks. (JEC DEN @ 3:6-7.) He was in charge of all of the moves involving a  
19 train’s make-up or break-up that occurred inside the Oakland Crew Base’s yard. (JEC DEN @  
20 3:7-8.) He oversaw the crew to make sure they performed all of the duties on the Mechanical  
21 Foreman’s switch list, including turning and switching out trains—taking out bad cars and  
22 putting in good ones—and all preventative maintenance. (JEC DEN @ 3:8-12.)

23 During his employment with Amtrak as a Conductor, Mr. Campbell did not receive  
24 written performance evaluations or reviews. (JEC DEN @ 3:13-14.) Mr. Campbell was  
25 subjected to numerous proficiency tests to see if he was in compliance with the rules, knew the  
26 rules or was operating safely. (JEC DEN @ 3:14-15.) A proficiency test is conducted when  
27 supervisors secretly observe your performance. (JEC DEN @ 3:15-16.) Mr. Campbell is aware  
28

1 of at least two (2) proficiency tests in Oakland, and eleven (11) which were conducted in the San  
2 Francisco Yard. (JEC DEN @ 3:16-17.) To the best of his knowledge, Mr. Campbell never  
3 failed a proficiency test. (JEC DEN @ 3:18.)

4 On March 24, 2000, Mr. Campbell was involved in an incident on the Yard where  
5 some cables were accidentally pulled apart. (JEC DEN @ 3:19-20.) The incident in March 2000  
6 did not involve the derailment of a box car. (JEC DEN @ 3:21-22.) Mr. Campbell was never  
7 told that the recommended decision for this incident was His termination. (JEC DEN @ 3:28.)  
8 Mr. Campbell also does not recall ever actually receiving a Letter of Reprimand. (JEC DEN @  
9 3:28-4:1.) There is no record that a Letter of Reprimand was in Mr. Campbell's personnel file  
10 when he applied for promotion to Engineer eighteen (18) months later in August 2001.

11 Almost two years later in January 2002, Mr. Campbell was involved in an incident  
12 where a boxcar derailed. (JEC DEN @ 4:4-5.) In that incident, Bill Birkett was the Engineer.  
13 (JEC DEN @ 4:5.) He ignored Mr. Campbell's instructions and pushed the boxcar off the  
14 tracks. (JEC DEN @ 4:5-6.) Mr. Birkett was not charged with any type of disciplinary action as  
15 a result of the incident. (JEC DEN @ 4:6-7.) Two months later, Mr. Birkett derailed two (2)  
16 passenger cars with a hard joint (JEC DEN @ 4:7-8.) Following that incident, he was banned  
17 from the Yard and disqualified as an Engineer Instructor. (*See also* Confidential Declaration of  
18 Pamela Y. Price in Opposition to Defendants Joe Deely and National Passenger Railroad  
19 Corporation's Motions for Summary Judgment Or In the Alternative, Partial Summary Judgment  
20 (hereinafter "PYP CON-DEN @")), Ex. H at pp. 76:24-77:1-4; 77:12-78:10; 79:3-11.)

21 Shortly after this derail, Mr. Campbell had a conversation with Rich Barnes, a union  
22 representative acting on his behalf, and His two supervisors, Gregg Baxter and Sid Birkett, about  
23 the boxcar derailment incident. (JEC DEN @ 4:10-12.) After Mr. Campbell described the  
24 events leading up to the derailment, Messrs. Baxter and Birkett agreed that it was the engineer's  
25 fault for not stopping the train in time. (JEC DEN @ 4:12-13.) During the conversation, Mr.  
26 Baxter said that he noticed Mr. Campbell had applied for engine service. (JEC DEN @ 4:13-14.)  
27 He suggested that he would get him in the next engineer's class coming up if Mr. Campbell took  
28

1 responsibility for the incident. (JEC DEN @ 4:14-15.) Mr. Baxter said, "We'll try to see what  
2 we can do in the next class." (JEC DEN @ 4:15-16.) Because Mr. Campbell believed Mr.  
3 Baxter was going to get him into the next engineer's class, Mr. Campbell agreed to take blame  
4 for the incident. (JEC DEN @ 4:16-17.)

5 Mr. Campbell did not receive a twenty (20) day suspension as a result of the boxcar  
6 derailment in January 2002. (JEC DEN @ 4:18-19.) The suspension imposed was only for ten  
7 (10) days. (JEC DEN @ 4:19.) Mr. Campbell served four days, including two days of his  
8 regular days off, and was immediately called back to work because they were short-handed.  
9 (JEC DEN @ 4:19-21.) Mr. Campbell did not ever actually serve the remaining six (6) days of  
10 the suspension. (JEC DEN @ 4:21.) Mr. Campbell also did not have another rules violation  
11 charge until July 2004. (JEC DEN @ 4:21-22.)

12 On July 24, 2004, Mr. Campbell was involved in an incident where his assistant  
13 conductor and engineer had a mis-communication resulting in a hard coupling. (JEC DEN @  
14 4:25-26.) On the night of the incident and at all times thereafter, the Assistant Conductor,  
15 Anthony Gillard admitted his error as the cause of the incident and accepted responsibility for the  
16 event. (JEC DEN @ 5:10-12; *see also* Declaration of Pamela Y. Price in Opposition to  
17 Defendants Joe Deely and National Passenger Railroad Corporation's Motions for Summary  
18 Judgment Or In the Alternative, Partial Summary Judgment (hereinafter "PYP DEN @")), Ex. E  
19 at pp. 46:13-48:1.) He was never charged with any rule violation or disciplined in any way.  
20 (PYP DEN, Ex. E @ 24:1-24:16; 48:2-21.)

21 AMTRAK claims that Mr. Campbell's actions in cutting out the air brakes were  
22 grounds for his termination. (JEC DEN @ 4:26-27) Up to that time, however, cutting out the air  
23 brakes are a common practice on the Yard. (JEC DEN @ 4:27-28; PYP DEN, Ex. D @18:15-  
24 21:2; Skinner DEN @ 3:19-23; Barnes DEN @ 3:17-20.) Other Yard conductors who cut the  
25 trucks out on a daily basis included Ray Clarke, Kevin Mayberry, Tim Sheridan, Cynthia  
26 Hubbard, and Don Majers. (JEC DEN @ 4:28-5:12; PYP DEN, Ex. D @ 23:7-24:2.)

27 In the July 2004 incident, there was no damage to any equipment and no injury to any  
28



1 personnel. (JEC DEN @ 5:3-4; PYP DEN, Ex. D @ 33:5-33:9; Ex. E @ 20:11-16.) Aside from  
2 the disruption in the relationship between the engineer and the Assistant Conductor, their work  
3 that night was not impacted. (JEC DEN @ 5:7-8; PYP DEN, Ex. D @ 33:10-21; Ex. E @ 20:17-  
4 21:13.) Mr. Campbell was not questioned or made aware in any way that evening that he would  
5 be charged with a rule violation for my actions that night. (JEC DEN @ 5:9-10.)

6 During his employment, Mr. Campbell interacted with Defendant Deely in a variety  
7 of circumstances. (JEC DEN @ 5:17-18.) At a safety meeting, Lou Bellotti, then the Assistant  
8 Superintendent, introduced him and his crew members by name to Defendant Deely. (JEC DEN  
9 @ 5:18-19.) Mr. Campbell spoke to Defendant Deely on that occasion. (JEC DEN @ 5:19.)  
10 Mr. Campbell was standing in front of Defendant Deely facing him within 5 feet. (JEC DEN @  
11 5:20.) After that introduction, while serving as the Yard Conductor, Mr. Campbell called  
12 Defendant Deely on the telephone and left messages for him on multiple occasions. (JEC DEN  
13 @ 5:21-22.)

14 Since 1998, Mr. Campbell has repeatedly been passed over for promotion to  
15 Engineer. (JEC DEN @ 5:23.) During his tenure with AMTRAK, Mr. Campbell watched as  
16 people he trained when they were Assistant Conductors under him were selected and promoted to  
17 Engineer service. (JEC DEN @ 5:24-25.) They include Josh Kyles, Brian Willson, Ken Powell,  
18 Jason Garman, Mike Poirier, Brice Carroll, Mike Yacovetti, Heidi Snyder, and Frank Caron.  
19 (JEC DEN @ 5:25-27.)

20 Since October 1998, based upon his review of the seniority roster, Mr. Campbell  
21 counted thirty-four (34) individuals whom AMTRAK has hired internally for engineer positions  
22 in the Bay Area. (JEC DEN @ 5:28-6:2.) Of those individuals, all of them are Caucasian except  
23 for Mr. Brice, who is multi-racial, and Mr. Ly, who is Vietnamese. (JEC DEN @ 6:2-3, Ex. A.)

24 Mr. Campbell has a burning desire to be a Locomotive Engineer. (JEC DEN @ 6:5)  
25 In the early years of his quest to become a Locomotive Engineer, Mr. Campbell was only  
26 interested in local positions in Oakland because his mother was sick and Mr. Campbell was her  
27 primary caretaker. (JEC DEN @ 6:5-7.) His Mom passed away in November 2002. (JEC DEN  
28



1 @ 6:7.) After that time, whenever Mr. Campbell applied to engineer positions, his application  
2 was for any position in or around the Bay Area, including San Jose and Sacramento. (JEC DEN  
3 @ 6:8-9.)

#### 4 **PROTECTED ACTIVITY**

5 On April 1, 2004, Mr. Campbell sent an e-mail to Susan Venturelli in AMTRAK's  
6 human resources department. (JEC DEN @ 8:13-14.) In the e-mail, Mr. Campbell complained  
7 about AMTRAK's racially discriminatory hiring practices and AMTRAK's disparate treatment  
8 of African-Americans. (JEC DEN @ 8:14-15.) Mr. Campbell complained that AMTRAK had  
9 passed him over five (5) times for promotion to an AMTRAK engineer position despite his  
10 excellent service record because he was African-American. (JEC DEN @ 8:15-17.) Mr.  
11 Campbell also complained that AMTRAK had not promoted a single African-American to  
12 engine service from 1998 to April 2004, the date that he wrote and sent the e-mail. (JEC DEN @  
13 8:17-19, Ex. 10.)

14 Sometime in April 2004, Mr. Campbell received a phone call from Rickie Donofrio,  
15 AMTRAK's Dispute Resolution Case Intake Coordinator, concerning the e-mail complaint.  
16 (JEC DEN @ 8:21-22.) Then, on April 10, 2004, Mr. Campbell left a voice mail message for  
17 Ms. Donofrio to inform her that he had filed a complaint about AMTRAK's racially  
18 discriminatory employment practices with the California Department of Fair Employment &  
19 Housing ("DFEH") and the U.S. Equal Employment Opportunity Commission ("EEOC"). (JEC  
20 DEN @ 8:25-28.) In the message, Mr. Campbell also expressed to Ms. Donofrio that he had  
21 filed the complaint because he was dissatisfied with AMTRAK's lack of response to his internal  
22 complaints. (JEC DEN @ 8:28-9:2.)

23 On April 21, 2004, AMTRAK sent Mr. Campbell a letter informing him that the  
24 Dispute Resolution Office (DRO) of AMTRAK's Business Delivery Department had received a  
25 copy of his e-mail complaint about AMTRAK's racially discriminatory employment practices  
26 but that it would not be investigating his complaint. (JEC DEN @ 9:3-6, Ex. 9.) The letter  
27 stated that the "DRO will not be looking into your concerns" because he took his "concerns to  
28

1 the EEOC.” (JEC DEN @ 9:6-7.) Instead of a response to his complaint, Ms. Donofrio sent him  
 2 a letter of counseling. (JEC DEN @ 9:10-11, Ex. 9.)

### 3 **RETALIATORY ACTS**

4 In May 2004, Mr. Campbell again applied for an engineer position. (JEC DEN @  
 5 7:19.) According to AMTRAK procedure, Mr. Campbell faxed and mailed an AMTRAK Job  
 6 Opportunity Application along with his résumé to AMTRAK’s Human Resources department in  
 7 Los Angeles. (JEC DEN @ 7:19-21.) Subsequently, AMTRAK’s Human Resources department  
 8 contacted him to schedule an interview. (JEC DEN @ 7:21-22.)

9 On July 7, 2004, Mr. Campbell interviewed with Chad Skinner, Larry Follis, and  
 10 Susan Venturelli. (JEC DEN @ 7:23-24.) During the interview, he described his experience as a  
 11 Machine Operator with Southern Pacific. (JEC DEN @ 7:24-25.) Mr. Campbell told Mr. Follis  
 12 that he had taken and passed the required tests to operate the various machines. (JEC DEN @  
 13 7:25-26.) Mr. Follis did not ask if Mr. Campbell had the certifications (which he does) and did  
 14 not mention any concerns to him about his duties at Southern Pacific. (JEC DEN @ 7:26-27.)  
 15 He also did not share those concerns with Chad Skinner, the union representative who sat in on  
 16 the engineer interviews. (Declaration of Chad Skinner (hereinafter “Skinner DEN”) @ 2:6-3:2.)

17 Within days after the interview, Mr. Skinner called him on the radio while he was  
 18 working in the Yard and said, “You finally made it,” in reference to the engineer position. (JEC  
 19 DEN @ 7:28-8:1; Skinner DEN @ 2:14-19.) Approximately two weeks later, Mr. Campbell  
 20 received a rejection letter from AMTRAK in the mail informing him that he did not get the  
 21 position. (JEC DEN @ 8:2-3.)

22 In August 2004, Amtrak promoted Brice Carroll, John Hanson and Patrick Duncan  
 23 for Engineer training for Oakland. (JEC DEN @ 8:4-5; PYP DEN, Ex. G @104:1-108:17 & Ex.  
 24 35.) Mr. Campbell worked with both Messrs. Carroll and Duncan. (JEC DEN @ 8:5-6.) Mr.  
 25 Campbell trained Brice Carroll for two (2) months to be an Assistant Work Train Conductor.  
 26 (JEC DEN @ 8:6.)

27 Mr. Campbell also worked with Patrick Duncan for two years, during which time he  
 28

1 was a mechanical foreman. (JEC DEN @ 8:9-10.) Mr. Duncan would make common mistakes  
2 in repairing cars such as putting wrong parts on passenger cars. (JEC DEN @ 8:10-11.)

3 On August 6, 2004, Amtrak charged Mr. Campbell with five separate rules violations.  
4 (JEC DEN, Ex. 25B.) On September 17, 2004, AMTRAK terminated him. (JEC DEN @ 9:15-  
5 16.) Within a year of his termination, on August 17, 2005, Mr. Campbell filed a Charge of  
6 Discrimination with the Department of Fair Employment and Housing for race discrimination  
7 and retaliation. (JEC DEN @ 9:17-19, Ex. 5.) In his Charge, he identified Defendant Deely as  
8 the discriminating official. (JEC DEN @ 9:19, Ex. 5.)

9 **I. MR. CAMPBELL CAN ESTABLISH A PRIMA FACIE CASE OF**  
10 **DISCRIMINATION AND RETALIATION**

11 Mr. Campbell's claims of race discrimination and retaliation both can be analyzed  
12 under a disparate treatment model, which applies when "an individual [has been] singled out and  
13 treated less favorable than others similarly situated on account of [race]." (*Gay v. Waiters' &*  
14 *Dairy Lunchmen's Union*, 694 F.2d 531, 537 (9th Cir. (1982).) To prevail in a Title VII disparate  
15 treatment case, the plaintiff must first establish a prima facie case of discrimination. (*McDonnell*  
16 *Douglas Corp. v. Green*, 411 U.S. 792, 807, 93 S.Ct. 1817, 1826-27, 36 L.Ed. 2d 668 (1973).)

17 The burden of establishing a *prima facie* case is not onerous. (*Texas Dep't of Cmty.*  
18 *Affairs v. Burdine*, 450 U.S. 248, 253, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).) At the summary  
19 judgment stage, the plaintiff needs only to present "minimal" proof that "does not even need to  
20 rise to the level of a preponderance of the evidence." (*Wallis v. J. R. Simplot Co.*, 26 F.3d 885,  
21 889 (9th Cir. 1994).) A plaintiff need only provide evidence **that suggests** that the employer's  
22 decision was based on a discriminatory motive that is illegal under the Civil Rights Act.  
23 (*International Brotherhood of Teamsters v. U.S.*, (1977) 431 U.S. 324, 358, 97 S.Ct. 1843, 52  
24 L.Ed.2d 396; *Hewlett-Packard v. Co.*, 358 F.3d 599, 604 (9th Cir. 2004); *Godwin v. Hunt*  
25 *Wesson Inc.*, 150 F.3d 1217, 1220 (9th Cir. (1998).)

26 As the nonmoving party, Mr. Campbell is not required to produce evidence in a form  
27 that would be admissible at trial in order to avoid summary judgment. (*Fed. Deposit Ins. Corp.*  
28 *v. N.H. Ins. Co.*, 953 F.2d 478, 485 (9th Cir. (1991).) At this stage, the test is whether the

evidence's contents would be admissible at trial despite the admissibility of the evidence's form. (*Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. (2003).) Accordingly, hearsay evidence may be considered on summary judgment if there is no indication that the declarant would later be unavailable to present the evidence through direct testimony. (*J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1542 (3d Cir. 1990).)

"[I]n cases in which the evidence could support a finding that discrimination is one of two or more reasons for the challenged decision, at least one of which may be legitimate, the jury should be instructed to determine first whether the discriminatory reason was 'a motivating factor' in the challenged action. If the jury's answer to this question is in the affirmative, then the employer has violated Title VII." (*Stegall v. Citadel Broadcasting Co.*, 350 F.3d 1061, 1067 (9<sup>th</sup> Cir. 2003), citing *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 856-57 (9th Cir. 2002), *affirmed*, *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *see also McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122-1123 (9<sup>th</sup> Cir. 2004).)<sup>2</sup>

## II. DIRECT EVIDENCE OF DEFENDANTS' RACIAL BIAS IS ADMISSIBLE TO ESTABLISH DISCRIMINATION AGAINST MR. CAMPBELL

Federal courts admit both direct and circumstantial evidence of discrimination to prove discrimination against a plaintiff on a specific occasion. (*International Brotherhood of Teamsters v. United States*, 431 U.S. *supra* at 358, n. 44; *see also, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-17 (1983).)<sup>3</sup> "Direct evidence' typically

<sup>2/</sup> Section 703(m) of Title VII provides *inter alia* that:

... an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

<sup>3/</sup> In *Mullen v. Princess Anne Volunteer Fire Fighter Co. Inc.*, 853 F.2d 1130, 1134 (4th Cir. 1988), the Court held that an African-American firefighter denied a position in a firefighting company could introduce evidence of past racial discriminatory statements and evidence of customary racist manners of speech by the defendant fire fighter company which were unrelated to the specific disputed action to show racial attitudes in the fire department and to prove the Department's specific intent to discriminate. The *Mullen* Court held that an employer's prior

1 consists of clearly sexist, racist, or similarly discriminatory statements or actions by the  
 2 employer.” (*Dominguez-Curry v. Nevada Transportation Dept.*, 424 F.3d 1027, 1038 (9th Cir.  
 3 2005), citing *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1095 (9th Cir. 2005).)

4 A supervisor’s discriminatory remarks are probative of intent even if he directed them  
 5 towards other people in the protected class. (*Id.*, see also *Coghlan*, 413 F.3d at 1095, n.6  
 6 (holding that even if an employer does not target his remarks directly at plaintiff, “when evidence  
 7 establishes the employer’s animus toward the class to which the plaintiff belongs, the inference  
 8 of fact of discrimination against the plaintiff is sufficiently small that we have treated the  
 9 evidence as direct.”) “Where a decisionmaker makes a discriminatory remark against a member  
 10 of the plaintiff’s class, a reasonable fact finder may conclude that discriminatory animus played a  
 11 role in the challenged decision.” (*Id.* at 1039; see also *Mondero v. Salt River Project*, 400 F.3d  
 12 1207, 1213 (9th Cir. 2005) (“An agent’s biased remarks against an employee because of his or  
 13 her gender are admissible to show an employer’s discriminatory animus if the agent was involved  
 14 in the employment decision.) (Emphasis added).)

15 By offering “very little” direct evidence of discriminatory or retaliatory motive, Mr.  
 16 Campbell rebuts the Defendants’ articulation of a non-discriminatory or non-retaliatory motive  
 17 behind its actions. (*Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (citing  
 18 and quoting other cases, noting that direct evidence is evidence which, if believed, proves  
 19 discriminatory animus without inference or presumption).) In *Godwin*, the Court found that  
 20 direct evidence included a statement that the defendant did not want to “deal with another  
 21 female,” suggesting bias against the plaintiff as a woman with the necessity of drawing an  
 22 inference. (*Godwin*, 150 F.3d *supra* at 1221.)

23 In *Morgan v. Amtrak*, a case tried twice before Judge Illston, the Ninth Circuit held  
 24 that the Court improperly excluded co-worker testimony regarding racial discrimination,

25 \_\_\_\_\_  
 26 discriminatory acts which would otherwise be inadmissible under FRE Rule 404(b) may be  
 27 introduced to show an employer’s **intent, motive and knowledge**. (*Id.*) This reasoning and the  
 28 outcome in *Mullen* was cited with approval by the Ninth Circuit in *Heyne v. Caruso*, 69 F.3d at  
*supra* 1480-1481.

1 including testimony regarding Defendant DEELY's discriminatory practices.<sup>4</sup> (*Morgan v.*  
 2 *National Railroad Passenger Corporation*, 232 F.3d 1008, 1017-1018 (9<sup>th</sup> Cir. 2000), citing  
 3 *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9<sup>th</sup> Cir. 1995) and *Spulak v. K Mart Corp.*, 894 F.2d 1150,  
 4 1156 (10<sup>th</sup> Cir. 1990); *see also* Exhibits 1 and 6 to Plaintiff's Request for Judicial Notice ("RJN")  
 5 filed and served concurrently herewith.)

6 The probative value of evidence that AMTRAK management discriminated or  
 7 retaliated against African-American employees is especially significant in part "because of the  
 8 inherent difficulty of proving [a defendant's] state of mind," a key issue in disparate treatment  
 9 and retaliation claims. (*Heyne*, 69 F.3d *supra* at 1480, citing *Mullen v. Princess Anne Volunteer*  
 10 *Fire Co.*, 853 F.2d 1130, 1133 (4<sup>th</sup> Cir. 1988); *see also Hunter v. Allis-Chalmers Corp., Engine*  
 11 *Div.*, 797 F.2d 1417, 1423-24 (7<sup>th</sup> Cir. 1986) (testimony that defendant Lambert had suspended  
 12 another black worker for a minor infraction and other evidence "disclosed a strong and persistent  
 13 pattern of racial hostility that management could hardly have been unaware of and that increased  
 14 the probability that [the plaintiff's] record-keeping irregularities were merely the pretext for the  
 15 harsh discipline meted out to him by a management irritated by his complaints about racial  
 16 harassment").) Because the evidence went to the issue of the defendant's intent, there was no  
 17 requirement that the Plaintiff be present or even know about the defendants' harassment of co-  
 18 workers. (*Id.*)

19 Thus, evidence of prior acts of discrimination is relevant to demonstrating motive  
 20 even where the evidence is not extensive enough to establish discriminatory animus by itself.  
 21 (*Estes v. Dick Smith Ford, Inc.* 856 F.2d 1097, 1102-1104, (8<sup>th</sup> Cir. 1988) quoted with approval  
 22 in *Heyne, supra* at 1480; *see also Stender v. Lucky Stores, Inc.*, 803 F.Supp. 259, 331-332  
 23 (N.D.Cal. 1992) (Defendant's involvement in two class action sex discrimination suits in the  
 24 \_\_\_\_\_

25 <sup>4</sup> AMTRAK litigated the *Morgan* case through two (2) trials, an appeal to the Ninth  
 26 Circuit which it lost and a hearing in the United States Supreme Court. (*See Morgan v. National*  
 27 *Passenger Railroad Corp.*, 232 F.3d 1008 (9<sup>th</sup> Cir. 2000), 536 U.S. 101 (2002). Following the  
 28 jury verdict after the second trial in May 2004, AMTRAK was faced with the costs bill as well as  
 the attorneys' fees under 42 U.S.C. Section 1988 for the entire case. The case settled in late 2004  
 as the parties were preparing to file cross-appeals in the Ninth Circuit.



early 1980s resulting in consent decrees was relevant to the defendant's notice of discriminatory practices such as those alleged in a suit whose liability period ran from January 1986 to 1992); *Equal Employment Opportunity Commission v. Farmers Brother Company*, 31 F.2d 891, 897 (9th Cir. 1994); *Detroit Police Officers Association v. Young* (6th Cir. 1979) 608 F.2d 671, 687; *Harvey v. Armour Co.*, 743 F.2d 199, 240 (4<sup>th</sup> Cir. 1984), *cert. den.* 470 U.S. 1395, 105 S.Ct. 1395, 84 L. Ed.2d 784 (1985); *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559, 562 (8th Cir. 1992).)

Even if the decisionmaker who made discriminatory remarks did not communicate his bias to other decisionmakers who are themselves not biased against the protected class, evidence of the racist remarks "is sufficient to permit a jury to find that animus affected the ultimate" employment decision. (*Dominguez-Curry v. Nevada Transportation Dept.*, 424 F.3d 1027, at 1040; *see also Lam v. University of Hawaii*, 40 F.3d 1551, 1560 (9th Cir. 1994) (noting that "among a group of fifteen decisionmakers, 'even a single person's biases may be relatively influential'").

If the decisionmakers worked closely together in formulating personnel decisions, a supervisor's bias may be imputed to the subordinate. (*Dominguez-Curry v. Nevada Transportation Dept.*, 424 F.3d 1027, at fn. 5, compiling cases, including *Wells v. New Cherokee Corp.*, 58 F.3d 233, 237-238 (6th Cir. 1995) (a supervisor's animus imputed to the ultimate decisionmaker, because evidence showed that the two "worked closely together and consulted with each other on personnel decisions" and they "themselves testified that they acted jointly") and *Laxton v. Gap Inc.*, 333 F.3d 572, 584 (5th Cir. 2003) (the relevant inquiry is whether the person who made the discriminatory remark "had influence or leverage over" the formal decisionmaker).)

Mark Carl Schulties testified under oath that Defendant DEELY and his subordinate managers expressed an attitude that African-Americans and women needed to be put or kept in "their place." (PYP DEN. Ex. C @ 44:18-46:2-24; 36:15-40:12; 60:19-64:25; 83:9-86:4; 107:20-110:3.) Defendant DEELY expressed to Mr. Schulties that he would not associate with



the African-American employees at the company's Christmas party. (PYP DEN, Ex. C @ 117:24-119:24.) Defendant DEELY even suggested to Mr. Schulties that he might lose his employment if he pressed his concerns about racism in the workplace. (PYP DEN, Ex. C @ 74:4-75:1; 76:14-80:23.) Mr. Schulties will also testify that Defendant DEELY required that every personnel action be approved by him. (PYP DEN, Ex. C @ 144:9-16; 189:3-190:23; *see also* Ex. F @ 43:3-7; 115:8-19; Declaration of Richard Barnes @ 3:21-25.)

Mary Fontaine has also stated under oath that she heard Defendant DEELY use racial epithets to refer to African-Americans. (Plaintiff's Request for Judicial Notice, Ex. A @ 2:7-13.) She also observed him treat people of color in a derogatory manner, alternating with condescending or aggressive tones of voice. (Plaintiff's Request for Judicial Notice, Ex. A @ 2:22-28.) She observed on multiple occasions that Defendant DEELY had a different, more stringent standard for disciplinary issues when it involved an African-American employee vs. a Caucasian employee. (Plaintiff's Request for Judicial Notice, Ex. A @ 2:20-4:7.)<sup>5</sup>

### III. RETALIATION IS A VIABLE CLAIM UNDER 42 U.S.C. §1981

Under *Manatt v. Bank of America, NA*, 339 F.3d 792 (9<sup>th</sup> Cir. 2003), the Ninth Circuit reaffirmed that where a plaintiff charges an employer with racial discrimination in taking retaliatory action, such plaintiff has stated a cause of action under § 1981. It follows that where an employer retaliates against the employee with a racially discriminatory motive, "then interference with rights protected by § 1981 has occurred and that section must come into play." (*Id.* at 800-01.)

Other circuits are in accord. (*See, e.g., Foley v. Univ. of Houston Sys.*, 324 F.3d 310, 316 (5<sup>th</sup> Cir. 2003) (holding that "an employee's claim that he was subjected to retaliation because he complained of race discrimination is a cognizable claim under § 1981(b)"); *Hawkins v. 1115 Legal Serv. Care*, 163 F.3d 684, 693 (2<sup>d</sup> Cir. 1998) ("We remain of the view, in light of the broad sweep of § 1981(b), that a retaliation claim may be brought under § 1981."); *Andrews*

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<sup>5</sup> Notably, Defendant DEELY acknowledged that Amtrak received two letters accusing him of racial discrimination, including a letter from Martin Yeager reporting that he overheard a conversation where Defendant DEELY used the "N" word. (Price DEN, Ex. B @ 23:1-19; 25:2-18.)

1 *v. Lakeshore Rehab. Hosp.*, 140 F.3d 1405, 1411 (11th Cir. 1998) (noting that the legislative  
 2 history for the 1991 Civil Rights Act supports the conclusion that Congress intended retaliation  
 3 claims to be cognizable under § 1981(b)); *see also O'Neal v. Ferguson Constr. Co.*, 237 F.3d  
 4 1248, 1258 (10th Cir. 2001); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1059 (8th Cir. 1997).)

5 **IV. MR. CAMPBELL EXHAUSTED HIS ADMINISTRATIVE**  
 6 **REMEDIES AGAINST DEFENDANT DEELY**

7 Numerous state and federal courts have held that the DFEH charge does not preclude  
 8 the naming of certain defendants or acts not mentioned in the administrative complaint, or  
 9 pursuing additional complaints, if it is likely that the party or the allegation would have been  
 10 discovered as part of an administrative investigation. (*See e.g., Chavira v. Payless Shoe Source*,  
 11 140 F.R.D. 441, 444-445 (E.D.Cal. 1991); *Hudson v. Moore Business Forms, Inc.*, 609 F.Supp.  
 12 467, 471 (D.C.Cal. 1985).)

13 The *Chavira* court held that better rule, and that adopted by the Ninth Circuit, is to  
 14 allow a suit against individuals not named in the administrative charge if their involvement was  
 15 likely to be uncovered in the administrative investigation. (*Chavira*, 140 F.R.D. *supra* at 443-  
 16 444.) The court also pointed out that where the discriminating employer is a company instead of  
 17 an individual, it is clear to all involved that one or more individuals are responsible for the  
 18 discriminatory actions. (*Chavira*, 140 F.R.D. *supra* at 445, fn. 3.)

19 Under this rule, as long as the unlawful retaliation and was likely to be uncovered in  
 20 any administrative investigation, Mr. Campbell is entitled to pursue those claims. His claims  
 21 against Deely would have been uncovered because they were never “hidden.” Defendant Deely’s  
 22 name appears on the face of the Charge of Discrimination itself in two separate places. It is well  
 23 settled that “[T]he remedial purpose of Title VII and the paucity of legal training among those  
 24 whom it is designed to protect require charges filed before the EEOC to be construed liberally.”  
 25 (*Stache v. International Union of Bricklayers and Allied Craftsmen*, 852 F.2d 1231, 1233 (9<sup>th</sup>  
 26 Cir. 1988); *Wrighten v. Metropolitan Hospital*, 726 F.2d 1346, 1352 (9<sup>th</sup> Cir. 1984); *Kaplan v.*  
 27 *International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354, 1359 (9<sup>th</sup> Cir. 1975).)

28 When an employee brings suit for incidents not listed in his prior EEOC charge, a

1 federal court may hear the new Title VII claims if they are 'like or reasonably related to the  
 2 allegations contained in the EEOC charge.'" (*Sosa v. Hiraoka*, 920 F.2d 1451 (9<sup>th</sup> Cir. 1990);  
 3 *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5<sup>th</sup> Cir. 1970); *Ong v. Cleveland*, 642 F.2d  
 4 316, 320 (9<sup>th</sup> Cir. 1981); *Green, supra* at 1475-76.) It is clear that the same reasoning and rule  
 5 applies to FEHA claims.

6 **V. AMTRAK'S ALLEGATIONS OF PERFORMANCE**  
 7 **DEFICIENCIES ARE A PRETEXT FOR**  
 8 **DISCRIMINATION AND RETALIATION**

9 A plaintiff is entitled to a trial where a reasonable jury could return a verdict for the  
 10 non-moving party. Whether in fact the employer's reasons are inconsistent or unworthy of belief  
 11 are not determinations appropriate at the summary judgment stage. There will always be a  
 12 question for the fact finder once an appellant establishes a *prima facie* case and raises a genuine  
 13 issue as to whether the employer's explanation for its action is true. Such a question cannot be  
 14 resolved on summary judgment." (*Washington v. Garrett*, 10 F.3d 1421, 1433 (9<sup>th</sup> Cir. 1993).)  
 15 In this case, Mr. Campbell can establish a *prima facie* case of racial discrimination by showing  
 16 (1) that he is a member of a protected class (African-American); (2) he was qualified for his  
 17 position; (3) AMTRAK disciplined and terminated him; and (4) AMTRAK did not discipline or  
 18 terminate similarly-situated non-African-American employees who violated the same or similar  
 19 work rules. (*McDonald v. Santa Fe Trail Transportation*, 427 U.S. 273, 96 S.Ct. 2574, 49  
 20 L.Ed.2d 493 (1976); *Green v. Armstrong Rubber*, 612 F.2d 967 (5<sup>th</sup> Cir. 1980); *Turner v. Texas*  
 21 *Instruments*, 555 F.2d 1251 (5<sup>th</sup> Cir. 1977); *Garrett v. City & County of San Francisco*, 818 F.2d  
 1515 (9<sup>th</sup> Cir. 1987).)

22 Irregularities and deviations from protocol support an inference of pretext sufficient to  
 23 overcome summary judgment. (*Porter v. Cal. Dep't of Corrections*, 383 F.3d 1018, 1031 (9<sup>th</sup>  
 24 Cir. 2004).) Departure from an employer's own rules, policies, practices or procedures, may  
 25 constitute evidence of pretext and unlawful motive. (*Gonzales v. Police Dept, City of San Jose*,  
 26 901 F.2d 758 (9<sup>th</sup> Cir. 1990).) Inconsistency in the application of decision-making process is  
 27 evidence of pretext. (*See Jauregui v. City of Glendale*, 852 F.2d 1128, 1135 (9<sup>th</sup> Cir. 1988)

(inconsistency in the City's selective application of its asserted basis for denying promotion to Officer Jauregui created an inference of unlawful discrimination).)

In appropriate circumstances, the trier of fact may reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt." (*Wright v. West*, 505 U.S. 277, 296, 120 L.Ed.2d 225, 112 S.Ct. 2482 (1992); *see also Wilson v. United States*, 162 U.S. 613, 620-621, 40 L.Ed.1090, 16 S.Ct. 895 (1896); J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn Rev. Ed. 1979).)

Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision. (*Cf. Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978) ("When all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts with *some* reason, based his decision on an impermissible consideration"). (*Id.* at 2108-2109.)

Thus, if a jury rejects an employer's explanations for its decision, it may conclude that unlawful discrimination or retaliation have occurred without further evidence. From the falsity of the explanation for the adverse action, a rational fact finder may infer that the employer is dissembling to cover up a discriminatory purpose. (*Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 147 L.Ed.2d 105, 120 S.Ct. 2097, 2109 (2000).) Proof that an employer's explanation is unworthy of belief may be "quite persuasive" evidence that the employer is "dissembling to cover up a discriminatory purpose". Such dishonesty about a material fact is "affirmative evidence of guilt." (*Id.* [citations omitted]).

In the instant case, Defendants have asserted that they terminated Mr. Campbell's employment based upon a "three-strikes" rule that allows them to terminate an employee who has incurred three "major" rule violations in the course of his employment. The evidence clearly

1 demonstrates, however, that the violation for which Mr. Campbell was terminated was not  
 2 “major” but quite common on the Yard. Engineer Richard Barrow, who was present on the night  
 3 of the event, testified under oath that “cutting the trucks out” was “pretty much common  
 4 practice.” (PYP DEN, Ex. D @ 18:15-20:6; *see also* Ex. D @ 20:7:-21:2; 23:7-25.)<sup>6</sup>

5 Mr. Barrow’s testimony is corroborated by the Declarations of Chad Skinner and  
 6 Richard Barnes, who also both attest to the fact that “cutting out trucks” was a common practice  
 7 in the Yard. (Declaration of Richard Barnes @ 3:17-20; Skinner Declaration @ 3:19-23.)  
 8 Messrs. Barnes and Skinner met with Steve Shelton following Mr. Campbell’s termination and  
 9 he even admitted to them that “he told them that it was not a terminating offense and that he  
 10 knew you would get back with pay. Joe told him just to do as he is told.” (Skinner Declaration  
 11 @ 4:4-14 and Exhibit 3 thereto; Declaration of Richard Barnes @ 2:23-28; 3:6-10.)

12 Defendants’ protestations that Mr. Campbell was “an accident waiting to happen” are  
 13 also belied by their treatment of other similarly-situated Caucasian employees who have been  
 14 charged with rule violations and remain employed by Amtrak. Discovery is continuing so there  
 15 will undoubtedly be even more examples at trial, however, even with limited information, there  
 16 are sufficiently egregious examples to withstand summary judgment.

17 Ray Clarke, a Conductor assigned to the Yard who often worked with Mr. Campbell  
 18 is particularly illustrative of Defendants’ pretext. Mr. Clarke’s disciplinary record reflects that he  
 19 was charged on six separate occasions with rule violations, including derailments, collisions and  
 20 split switches. (PYP CON-DEN, Ex. H @ 48:2-24; 54:11-86:5; Ex. 41, 42, 43A, 44, 45, 47, and  
 21 48.) As set forth in Exhibit 41, 42 and 44, Mr. Clark has been blessed with two separate ten (10)  
 22 day suspensions. He’s received three final warnings since 2004. For an incident involving a split  
 23 switch in June 2001, he received a three day suspension held in abeyance for six months. Less  
 24 than six months later, in November 2001, he was charged with a series of rule violations for a  
 25 derailment of two passenger cars, but only received a four day suspension, a Letter of Reprimand

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26  
 27 <sup>6/</sup> According to Mr. Barrows, “any regular yard conductor that I’ve worked with over the  
 28 years at some point in time has cut trucks out, not saying that it was a common practice for them to  
 do it. So do it more than others.” (PYP DEN, Ex. D @ 23:7-25.)

1 and 4 days held in abeyance for 6 months.<sup>7</sup> According to Mr. Clarke, there was no mention of  
2 the previous three day suspension which was “held in abeyance” in June 2001. (PYP CON-  
3 DEN, Ex. H @ 77:1-78:11; 80:8-21.)

4 Amtrak’s leniency toward its Caucasian employees is also reflected in its treatment of  
5 Donald Bruce Shelton. On November 10, 1999, Mr. Shelton was charged with failure to stop  
6 short of a derail switch in San Jose, causing a derailment. (PYP CON-DEN, Ex I @ 63:17-20.)  
7 Mr. Shelton signed waiver and accepted a three (3) day suspension. (PYP CON-DEN, Ex. I @  
8 71:8.) On July 21, 2000, Mr. Shelton was charged with splitting a switch. (PYP CON-DEN, Ex.  
9 I @ 69:19.) He signed a waiver and accepted a one (1) day suspension and ten (10) days held in  
10 abeyance. (PYP CON-DEN, Ex. I @ 74:13.)

11 On July 8, 2002, Mr. Shelton caused a train to depart prior to schedule without  
12 receiving authorization from the San Jose control tower. (PYP CON-DEN, Ex. I @ 74:24.) He  
13 signed a waiver, accepting a reprimand and six (6) months of probation. (PYP CON-DEN, Ex. I  
14 @ 76:13, 77:10, 77:17.) On July 31, 2002, Mr. Shelton was charged with failing to protect the  
15 movement of a train, failing to stop short of an improperly lined switch, causing a split switch.  
16 (PYP CON-DEN, Ex. I @ 78:4.) He signed a waiver, accepting twenty-five (25) days of  
17 suspension, of which he served only five (5) days, the remainder being held in abeyance. (PYP  
18 CON-DEN, Ex. I @ 81:20.)

19 On April 10, 2003, Mr. Shelton was involved in a derailment in San Francisco Yard.  
20 (RJN, Ex. 3 @ 5:24.) The train was traveling less than seven miles per hour at the time, and  
21 there were no injuries. (RJN, Ex. 3 @ 7:21.) C. Faheem Hardeman, one of the very few African-  
22 American engineers in the Pacific Division, was responsible for controlling the brakes and gas of  
23 the train. (RJN, Ex. 3 @ 6:1.) As part of his duties, Mr. Shelton were responsible for directing  
24 Mr. Hardeman, ensuring a clear pathway and proper alignment of switches, and providing Mr.  
25 Hardeman instructions before and during the actual movement of the train. (RJN, Ex. 3 @ 6:4-  
26

27 <sup>7</sup> In contrast, Mr. Campbell received a ten day suspension with ten days held in abeyance for  
28 a derailment in January 2002. (JEC DEN @ 4:5-23.)



5.) When the crew came upon Switch No. 39, the engine derailed. (RJN, Ex. 3 @ 6:20.) Neither AC Soule nor Mr. Shelton had complied with their duties to ‘be on the point’ or ‘protect the movement of the train.’ (RJN, Ex. 3 @ 6:6; PYP CON-DEN, Ex. I @ 101:12-19.)

All three (3) crew members were charged with failing to obey the restrictive speed rule. Mr. Shelton was initially charged with an operating rules violation, but he objected to the charge. (PYP CON-DEN, Ex. I @ 53:17-54:5.) He felt it was not fair to be charged with an operating rules violation because he was present in the cab in the capacity of observer on that day, although he was a rules certified Conductor. (PYP CON-DEN, Ex. I @ 53:17-54:5.) He took the issue up with senior management, notifying them that he would “fight it all the way.” (PYP CON-DEN, Ex. I @ 53:17-54:5.) Mr. Shelton spoke directly with Amtrak manager Charlie Miller about the charged operating rule violation. (PYP CON-DEN, Ex. I @ 53:17-54:5.) Mr. Miller reduced the charge to a Standards of Excellence violation, which meant that after two years, the violation can be purged from the record, whereas an operating rules violation remains on an employee’s record forever.<sup>8</sup> (PYP CON-DEN, Ex. I @ 53:17-54:5.)

Mr. Hardeman was terminated on May 30, 2003. (RJN, Ex. 3 @ 8:20.)

Mr. Campbell is prepared to prove at trial that the Amtrak regime led by Defendant Deely in the Bay Area has a history, pattern and practice of disciplining African-American and other non-Caucasian employees more harshly than Caucasian employees in virtually every craft, including Conductors and engineers. These practices violate 42 U.S.C. Section 1981 at its very core, as well as the analogous state law embodied in FEHA.

**V. MR. CAMPBELL WAS RETALIATED AGAINST FOR  
ENGAGING IN ACTIVITY PROTECTED BY 42 U.S.C.  
1981 AND FEHA**

To prevail in an action for retaliation under FEHA or 42 U.S.C. Section 1981, Mr.

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<sup>8/</sup> Notably, this was Mr. Shelton’s fifth documented rules violations. As set forth in the Declaration of C. Faheem Hardeman, disparity in the actual decision to charge a violation in the first place was rampant, and he found himself unduly singled out for discipline on matters that are glossed over for non-African-American employees. (RJN, Ex. 3; *see also* Declaration of Richard Barnes @ 3:14-16; 3:26-28; RJN, Ex. 1 @ 3:1-4:15.)



Campbell must prove that engaging in protected activity was one of the reasons for the adverse action against him and but for such activity, the adverse action would not have occurred. (*Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1064 (9<sup>th</sup> Cir. 2002); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1140-41 (9<sup>th</sup> Cir. 2001); *McAlindin v. County of San Diego*, 192 F.3d 1226, 1238 (9<sup>th</sup> Cir. 2000).) Asserting one's civil rights in the employment environment is considered protected activity. (*E.E.O.C. v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9<sup>th</sup> Cir. 1983).)

Furthermore, the U.S. Supreme Court recently upheld *Ray v. Henderson*, 217 F.2d 1234, 1245 (9<sup>th</sup> Cir. 2000), and held that Title VII's anti-retaliation provision covers those employers' actions that are materially averse to a reasonable employee and harmful so that they could dissuade a reasonable worker from testifying in a Title VII proceeding. (*Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. \_\_\_, 126 S.Ct. 2405 (2006).) An employer's retaliatory motive can be established by the temporal proximity between the protected activity and the adverse action. (*Yartsoff v. Thomas*, 809 F.2d 1371, 1375-1376 (9<sup>th</sup> Cir. 1989).) (*Ray v. Henderson*, 217 F.2d *supra* at 1245; *see also Miller v. Fairchild Ind.*, 885 F.2d 498, 503 (9<sup>th</sup> Cir. 1989).) *Payne v. Northwest Corp.*, 113 F. 3d 1078, 1080 (9<sup>th</sup> Cir. 1997).)

The third element of the prima facie case, causal link, may be established be inferred from circumstantial evidence, "such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision. (*Miller*, 797 F.2d at 731-32; *Yartsoff*, 809 F. 2d at 1376.) Moreover, "[a]t the summary judgment stage, the prima facie case need not be proved by a preponderance of the evidence." (*Miller*, 797 F.2d at 731.)

Temporal proximity merely provides an evidentiary basis from which an inference of a causal link can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation. (*Porter v. California Dept. Of Corrections*, 383

1 F.3d 1018, 1030 (9<sup>th</sup> Cir. 2004), *citing Kachmar v. SunGard Data Sys. Inc.*, 109 F. 3d 173, 177-  
2 78 (3<sup>rd</sup> Cir. 1997).) In *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9<sup>th</sup> Cir. 2003), the Court  
3 cautioned that a “specific time period cannot be a mechanically applied criterion. A rule that any  
4 period over a certain time is per se too long (or conversely, a rule that any period under a certain  
5 time is per se short enough) would be unrealistically simplistic.”

6 While Defendant DEELY and his subordinate, Steve Shelton, outright deny that they  
7 had any knowledge of Mr. Campbell’s protected activity, their convenient disclaimers must be  
8 considered against the duty the law imposes upon them to prevent discrimination and other  
9 evidence which shows that their disclaimers are in effect a deliberate attempt on their part to  
10 close their eyes to information which was obviously available to them. (*United States v. Jewell*,  
11 532 F.2d 697 (9<sup>th</sup> Cir. 1976) (*en banc*), *cert. denied*, 426 U.S. 951 (1976).)

12 Indeed, California law imposes an affirmative duty on managers and others  
13 responsible for the management of an enterprise to prevent discrimination. (*See Trujillo v. North*  
14 *County Transit District*, 63 Cal.App.4th 280 (1998).) Defendant DEELY and Steve Shelton, as  
15 high ranking AMTRAK managers, surely had such an affirmative duty. They cannot close their  
16 eyes to events any reasonable, prudent manager in their place would be expected to be aware of  
17 which affected their enterprise or business.

18 The factual premise of Defendants’ contention that there is insufficient proximity  
19 between Mr. Campbell’s protected activity and their retaliatory acts is also flawed. The evidence  
20 is that Mr. Campbell was communicating his concerns to Amtrak’s internal EEO department in  
21 April 2004, less than four months prior to his termination and his non-selection for the sixth time  
22 for an engineer position. On this record, a reasonable jury could disbelieve Defendants’  
23 disclaimers.

24 Furthermore, even, where the facts are not disputed, if reasonable minds could differ  
25 on the inferences which may be drawn from the undisputed facts, summary judgment must be  
26 denied. (*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970);  
27 *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F. 2d 872, 875 (9<sup>th</sup> Cir. 1987).) The  
28

1 function of summary judgment is “. . . not to weigh the evidence or determine the truth of the  
 2 matter, but only to determine whether there is a genuine issue for trial.” (*Abdul-Jabbar v.*  
 3 *General Motors*, 85 F.3d 407, 410 (9<sup>th</sup> Cir.(1996).)

4 Mark Carl Shulties’ testimony also illustrates the perniciousness of Amtrak’s  
 5 promotional practices. He testified under oath that his efforts to promote Mr. Campbell were  
 6 thwarted and rebuffed from the very beginning of Mr. Campbell’s tenure with Amtrak. (PYP  
 7 DEN, Ex. C @ 65:2-69:7; 74:4-28.) He testified that the so-called one year rule was frequently  
 8 waived, and identified specific individuals who were promoted with less than one year tenure and  
 9 a history of rule violations. (PYP DEN, Ex. C @ 69:20-71:4; 172:12-183:21; 196:11-198:7;  
 10 199:200:10; 200:25-201:13.)

11 Defendants’ claim that Mr. Campbell’s disciplinary record “disqualified” him is also  
 12 belied by Ms. Venturelli’s testimony that Mr. Deely decided to waive the rule for one applicant  
 13 (Than Ly) while refusing to waive it for Debrice Gallo, an African-American female. (PYP  
 14 DEN, Ex. G @ 116:10-117:12; 118:4-119:10; 121:4-122:3 and Ex. 32, 35 and 36.) Exhibit 36 is  
 15 also particularly telling in that it reflects that the supervisor for one of the applicants chosen over  
 16 Mr. Campbell reported that the applicant was “below average” in every category of job  
 17 performance. (PYP DEN, Ex. G @ 123:7-23.) Significantly, Ms. Venturelli and Mr. Follis’  
 18 claims that the panel disqualified Mr. Campbell are contradicted by Mr. Skinner as well as the  
 19 documentary evidence which reflects that Mr. Campbell had one of the highest scores. (Skinner  
 20 Declaration @ 2:6-3:12; PYP DEN, Ex. K & L.)

21 It is well settled that “promotional systems which depend upon the subjective  
 22 evaluation and favorable recommendation of immediate supervisors provide a ready vehicle for  
 23 discrimination.” (*Page v. U.S. Industries, Inc.*, 726 F.2d 1038, 1054 (5<sup>th</sup> Cir. 1984); *Rowe v.*  
 24 *General Motors Corp.*, 457 F.2d 348 (5<sup>th</sup> Cir. 1972); *Atonio v. Wards Cove Packing Company,*  
 25 *Inc.*, 810 F.2d 1477, 1481 (9<sup>th</sup> Cir. 1987); *Jauregui v. City of Glendale*, 852 F.2d 1128, 1135-  
 26 1136 (9<sup>th</sup> Cir. 1988).) While the Ninth Circuit has held that the use of subjective factors to  
 27 evaluate applicants for promotion is not illegal *per se*, it is understood that “subjective practices

are particularly susceptible to discriminatory abuse and should be closely scrutinized.” (*Atonio v. Wards Cove*, 810 F.2d at 1481; *accord, Jauregui v. City of Glendale*, 852 F.2d at 1135-1136, and cases cited therein; *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1187 n. 17 (9<sup>th</sup> Cir. 2002)).

#### VI. DEFENDANT DEELY MAY BE HELD LIABLE FOR PUNITIVE DAMAGES

It is a triable issue of fact whether Mr. Campbell is entitled to punitive damages. (See, e.g., *EEOC v. Wal Mart Stores*, 156 F.3d 989 (9<sup>th</sup> Cir. 1998); *see also Emmel v. Coca-Cola Bottling Co. of Chicago*, 95 F.3d 627, 637 (7<sup>th</sup> Cir. 1996) (“affirming the district court’s award of punitive damages where the defendant had terminated the plaintiff’s employment for refusing to withdraw her discrimination claim, and gave false reasons for terminating her”).) In the instant case, the evidence clearly suggests that Defendants were aware that their reasons for terminating Mr. Campbell were pretextual.

In *EEOC v. Wal-Mart*, 156 F.3d at 993, the Ninth Circuit held that Wal-Mart’s decision to not hire the plaintiff because she was pregnant and *their subsequent attempt to cover up the discrimination* was sufficient evidence that defendant “acted with malice or reckless indifference to the complaining party’s federally protected rights.” In this case, triable issues of fact exist whether Defendant Deely discriminated against Mr. Campbell because he is African-American, retaliated against him because he complained of the discrimination, and orchestrated his termination. Clearly, the amount of punitive damages necessary, if any, to punish Defendant Deely and deter him from committing the same offenses in the future should be resolved by a jury.

#### CONCLUSION

Based on the foregoing, Mr. Campbell respectfully requests that the Court deny the Defendants’ motion for summary judgment as well as their motion for partial summary judgment except as set forth in footnote 1 *supra*.

Dated: May 1, 2007

PRICE AND ASSOCIATES

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